IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.421 OF 2005

Shri Devnath Ramnaval Shrma
Age - Adult, Occupation-Business,
R/at.Indrani Niwas,
Opp. Dutta Mandir,
Murbad Road, Kalyan,
District - Thane. .. Appellant

Vs.

Shri Sadashiv Narayan Jaiwant
Age - Adult, Occupation - Retired,
R/at. Jaiwant Bungalow,
Murbad Road, Kalyan,
District - Thane. .. Respondent.

WITH

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District - Thane. .. Respondent.

Mr.G.S.Godbole for the appellant.
Mr.M.D.Angal for the respondent.

CORAM : D.B.BHOSALE, J.

DATED : 20TH DECEMBER, 2006.

ORAL JUDGMENT:

. These two second appeals arise from a common

judgment and order dated 5.2.2005 passed in two civil appeals bearing Nos.113 of 1998 and 110 of 1998, filed against the common judgment and order rendered in regular civil suit nos.243 of 1985 and 395 of 1985 respectively, by which both the appeals were dismissed with costs. The parties and the subject matter in both these appeals are one and the same and hence they are being disposed of by common order.

2. This court at the request of the learned counsel for the parties and perhaps considering the age of the respondent, who is 96 years, had made it clear that the appeals would be heard finally at the stage of admission. It further appears that the parties on the directions of this court have filed compilations of all the relevant documents consisting of the pleadings, evidence, documents produced before the trial Court etc. In the circumstances, I heard the learned counsel for the parties for quite sometime. I perused all the material to which my attention was drawn by the learned counsel including the impugned judgments.

3. The subject matter of the suits is the area admeasuring 35’ X 60’, hereinafter referred to as "the suit premises", out of survey no. 34-A, Hissa No.12 part situate at Chikanghar, Kalyan admeasuring 1999

sq.Yards. Admittedly, the respondent-plaintiff in second appeal No.421 of 2005, hereinafter referred to by his first name Sadashiv, is the owner of the whole property, that is, 1999 sq. yards. Admittedly Sadashiv had let out open space admeasuring 59’ X 39’from the aforesaid land at the ground rent of Rs.25/- per month to the appellant-defendant, hereinafter referred to by his first name Devnath. Devnath has been carrying on business of milk selling for which he constructed a shed on the aforesaid open space admeasuring 59’ X 39’. The tenancy in respect of the said portion of land commenced on 1.3.1971. According to Sadashiv, Devnath encroached upon the suit premises out of remaining land in S.No.34-A, Hissa No.12 and, therefore, he was forced to file regular civil suit no.395 of 1985 for declaration that Devnath is trespasser on the suit premises and for a decree of eviction.

4. As against this, the case set up by Devnath was that he was in need of additional premises for his business and he requested Sadashiv to let out additional portion of the land from the same survey number at the monthly rent of Rs.25/-. The request was accepted by Sadashiv and the suit premises was accordingly, given on lease for which Devenath paid rent of Rs.250/- for ten months, that is, September,

1971 to June, 1972 by cheque no.475 dated 13.9.1971 drawn on Canara Bank, Kalyan in favour of Sadashiv. Admittedly, when the open space admeasuring 59' X 35' was let out, a registered lease agreement was executed on 18.2.1971, whereas no such agreement was executed when the suit premises was allegedly let out to Devnath. In view of the exchange of notices and threat to the possession, Devnath also filed regular civil suit no.243 of 1985 for declaration that he is lawful tenant of the suit premises and for permanent injunction restraining Sadashiv from interfering with his possession thereof. Both the suits, filed by Sadashiv and Devnath were heard together and disposed of by the common Judgment, concurrently holding that Devnath is the trespasser.

5. Both the courts below after having assessed the evidence placed on record have concurrently held that Devnath has failed to prove that the suit premises was let out to him in September, 1971 and that he is the tenant having protection of the Bombay Rent Act. These finding of facts are being challenged in these appeals filed by Devnath.

6. This is the second round of Devnath to approach this court against the order passed by the courts below. Earlier he had filed two second appeals

bearing nos.834 of 2003 and 835 of 2003. This court vide order dated 29th September, 2004 its allowed both the appeals by setting aside the orders passed by the first appeal court dated 25.8.2003. The matters were remanded to the appeal court to record its findings on the questions framed by this court in the order dated 29.9.2004. It would be necessary and relevant to reproduce paragraph nos.3 to 5 of the order dated 29.9.2004 by which the aforesaid second appeals were disposed of by the common order. The relevant paragraphs read thus:

> "3. Without going into the details regarding merits involved, it must be noted that the Civil Court raised issue regarding proof of payment to the defendant of Rs.1200/- by cheque No.471 dated 20.2.1971 and Rs.1000/- in cash as an advance amount towards the agreement of lease dated 18.2.1971. In this regard, it must be noted that the question involved at the trial stage was whether the plaintiff had proved such payment by primary evidence. Evidently there was no primary evidence available due to the destruction of bank record and, therefore, the plaintiff sought to rely on secondary evidence by producing the passbook of the bank having relevant entries. That aspect was adjudicated against the plaintiff on various grounds culminating to the effect that the plaintiff was unable to establish such payment of rent by way of cheque through the bank.
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> 4. The matter was carried to the lower Appellate Court wherein various grounds were raised by the plaintiff-appellant in respect of leading of secondary evidence and matter pertaining to the same aspect. However, it is brought to my notice that, while adjucating the appeal by a common judgment, the lower Appellate Court Judge did not utter a whisper in that regard in the course of his judgment

dated 25.08.2003 and dismissed the appeal. Now, in these second appeals, the appellant has sought to raise substantial questions of law as follows :-

(1) Whether the Court below overlooked that by production of the counterfoil of cheque No.471 dated 20.2.1971 of Canara Bank, Kalyan, which showed the name of the respondent as payee, the fact of issuance of cheque had been fully proved by the appellant and in the absence of an explanation from the respondent, the Court below ought to have, held that the issuance of said cheque towards the deposit has been duly proved ?

(2) Whether the Courts below failed to note that since the appellant had examined Shri Madhukar Sawant, Officer of Bank at Exh.125 who had deposed that the original record for the year 1971 is destroyed, the pass book was liable to be admitted as secondary evidence, since the debit entry in the pass book clearly indicated that the amount of Rs.250/- had been debited to the account of the appellant and credited in the name of the respondent, the payment was duly proved?

(3) Whether the learned Judge of the appellate Court has filed in its duty under order 4 Rule 31 of C.P.C. by failing to independently discuss all the issues which were discussed and considered by the Trial Court.

5. In my considered view, these are the issues which should have been adjudicated by the lower Appellate Court in proper perspective on the basis of available evidence which has not been done. It is to be noted that, it is now well settled position of law that under Sec.100 of the C.P.C. the finding of fact howsoever erroneous recorded by the lower Appellate Court would be binding on the High Court in second appeal and it cannot be gone into as those are questions of fact. However, at the same time, when the position similar to the one which has arisen in the present appeals arises, then it becomes substantial question of law, because the lower Appellate Court has remained totally silent on the issue and has not recorded its finding in clear terms of those issues. Under the circumstances, it is necessary that both these

> matters are required to be remanded to the lower Appellate Court for adjucation on the issues noted above only."

7. It is against this backdrop the appeal court once again disposed of the regular civil appeals by common judgment and order dated 5.2.2005, impugned in the instant appeals.

8. Mr.Godbole, learned counsel for Devnath, at the outset, submitted that the courts below overlooked that by producing a counter foil of cheque no.475 dated 20.2.1971 drawn on Canara Bank, Kalyan, which show the name of Sadashiv as payee, the fact of issuance of cheque stands duly proved and in the absence of any explanation from Sadashiv, the court below ought to have held that payment of the cheque was towards the ten month’s rent of the premises in dispute. He further invited my attention to the passbook of Canara Bank having entry of the payment of Rs.250/-, allegedly made by Devnath to Sadashiv, to contend that the pass book was admitted as secondary evidence as contemplated by section 63 and 65 of the Indian Evidence Act, and in view thereof the payment of Rs. 250/- towards the advance rent of the suit premises stands proved. Mr.Godbole invited my attention to the letter dated 3.3.1998 addressed to the advocate of Sadashiv by the advocate of Devnath calling upon Sadashiv to produce his bank passbook to

prove the payment of Rs.250/- by payee's account cross cheque dated 13.9.1971 and submitted that the court below has committed gross error in observing in paragraph 12 of the judgment that no efforts were made by Devnath to prove the receipt of the payment by Sadashiv of the said cheque. My attention was also drawn to the evidence of Madhukar Sawant, Officer of the bank to prove the entries in the passbook. Mr.Godbole invited my attention to the receipt at Exhibit-73 and submitted that the only possible conclusion that could be drawn on the basis of the said receipt is that the another receipt at Exhibit-69 dated 31.9.1980 was in respect of the suit premises. Similar contention was raised in respect of the counter foil of the cheque no.471 dated 20.2.1971 showing the name of Sadashiv as payee. He further submitted that the appeal court after remand did not address the aforesaid questions framed by this court in the order dated 29.9.2004 and, therefore, the judgment of the appeal court deserves to be set aside or the matter may be remanded for fresh hearing.

9. On the other hand Mr.Angal, learned counsel for Sadashiv took me through the pleadings and the documents to contend that even if it is assumed that the entries in the passbook and the counter foil are held to be proved, it cannot be stated that the

payment was received by Sadashiv and this aspect has been rightly dealt with by the appeal court in the impugned judgment and in particular paragraph 10 to 13 thereof. Mr.Angal submitted that merely because the passbook is admitted in evidence does not mean that the entries made therein are sufficient to draw an inference that the payment of Rs.250/- was received by Sadashiv towards advance rent of the suit premises. He submitted that Devnath has miserably failed to prove that the amount of Rs.250/- for the period from September, 1971 till June 1972 and Rs.600/- for the period January, 1978 to December, 1979 was received by Sadashiv towards rent of the suit premises. Mr.Angal submitted that Sadashiv has categorically denied to have received Rs.250/- allegedly paid by cheque no.475 dated 13.9.1971 drawn on Canara Bank, Kalyan. Lastly, he submitted that no substantial question of law is involved in these appeals warranting interference by this court in its extremely limited jurisdiction under section 100 of the Code of Civil Procedure.

11. At the outset I would like to deal with the submission of Mr.Godbole that the payment of Rs.250/- made by cheque towards rent of the suit premises has been duly proved by placing on record the counter foil and the passbook coupled with the oral testimony of Madhukar Sawant, officer of the bank. Admittedly, the

original record of the bank pertaining to the entry in respect of cheque no.471 dated 20.2.1971 was not placed on record as it was destroyed by the bank. In view thereof the passbook and the counter foil of the cheque book was heavily relied upon by Devnath. To prove these documents Madhukar Sawant, branch Manager of Canara Bank, Kalyan branch, was examined. The bank Manager, insofar as counter foil of cheque no.471 is concerned, in the cross examination has made it clear that the bank has no control over or knowledge about the entry or endorsement made by the account holder. He further stated that merely because the name of a particular person is mentioned on the counter foil of the cheque does not mean that the cheque was issued in favour of the same person unless it is established by some other admissible evidence that the payment was in fact received by such person. In short, he stated that counter foil of a cheque is certainly not an evidence to hold that the payment has been received by the person whose name is written on the counter foil. I find substance in the submission that it is possible to create a record of issuance of a cheque in favour of a particular person by making an endorsement/entry on the counter foil to show that the cheque was issued in his favour. But that, in my opinion, would not be sufficient to hold that the payment was received by the very same person. Best evidence in such case

would be either a record of the payees' Bank, if the cheque was cross or the cheque itself showing the endorsement/signature of the payee having received the payment, if the cheque was bearer. Devnath could have got the record produced from Sadashiv's Bank or the original cheque with the signature or endorsement made by Sadashiv of having received the payment produced. Such efforts were not made by Devnath.

12. It is true that Devnath in his deposition has stated that he had issued account payee cross cheque of Rs.250/- dated 20.2.1971 to Sadashiv. However, the pleadings are silent. Except the letter dated 3rd March, 1998, by which Sadashiv was called upon to produce his bank passbook, Devnath did not make any efforts to prove that the cheque was cross cheque and payment was credited in the account of Sadashiv. He could have called upon Sadashiv to produce the statement of account or could have got the ledger produced or examined the Bank Officer to prove the payment. However, such efforts were not made by him. Even if the bank passbook, as requested vide letter dated 3.3.1998 by the advocate of Devnath, was produced it had not served the purpose since bank passbook, as it is, is not admissible in evidence and cannot be relied upon unless it is allowed to be produced as secondary evidence.

13. The courts below, in my opinion, have rightly held that even if the counter foil is held to be proved it would not be sufficient to hold that the payment of Rs.250/- was received by Sadashiv. Similarly, even the bank passbook, in my opinion, is not sufficient to hold that the payment was in fact received by Sadashiv. The bank Manager has clearly admitted in his evidence that if a cheque is bearer cheque, the name of a person appearing in the cheque would be entered in the bank record and the bank passbook irrespective of the fact whether payment was received by such person. In the present case it is not clear whether the cheque was bearer or cross cheque. Except a stray admission in the cross examination, there is nothing on record to hold that the cheque was cross cheque. If it was cross, no efforts were made by Devnath to establish that the amount of cheque was credited in Sadashiv's bank account and if it was bearer, even if the name of Sadashiv was mentioned, does not mean that the cheque was given to Sadashiv and he received the payment. In the absence of original record, namely, the cheque with endorsement of Sadashiv having received the amount or the ledger, it would not be possible to draw an inference that the payment was made to Sadashiv and, in fact, he received it. In the circumstances

the court below has rightly held that Devnath ought to have establish by cogent evidence that the amount of Rs.250/- was in fact received by Sadashiv. Insofar as payment of Rs.600/-, allegedly made by Devnath for the period from January, 1978 to December, 1979, and for which receipt at Exhibit-69 dated 31.1.1980 was issued, concerned, it cannot be linked with the suit premises since the receipt does not indicate that it pertains to the suit premises. Similarly, merely because the period of receipts at Exhibit-69 and Exhibit-73, that is, between January 1978 to June 1978 overlaps, that by itself would not be sufficient to draw an inference that the receipt at Exhibit-69 was against the rent of the suit premises. It could be an error as rightly observed by the appeal court in paragraph 11 of the judgment. The submissions of Mr.Godbole, based on section 63, 65 and 66 of the Evidence Act, in view of the aforesaid findings of fact, must be rejected. In my opinion, the inferences drawn and the findings of fact recorded by the courts below warrant no interference by this court. The appeal Court has addressed the questions of law formulated by this court in the order of remand and, therefore, the request of remand, made by Mr.Godbole is liable to be rejected. No substantial questions of law are either raised or involved in the instant appeals. Considering that there are concurrent

findings recorded by the courts below and as I find there is sufficient material on record to sustain those findings and considering extremely limited jurisdiction of this court under section 100 of the Code of Civil Procedure to disturb the findings of fact these second appeals fail, and are dismissed as such, with costs.

14. Mr.Godbole, learned counsel for the appellants prayed for protection for a period of six weeks. Though Mr.Angal, learned counsel for the respondent opposed the prayer, I am inclined to grant the protection, as prayed for. Order accordingly.

(D.B.Bhosale, J.)

HIGH COURT AT BOMBAY
CIVIL APPELLATE JURISDICTION

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Date of Decision: 20th December, 2006.

For approval and signature:

The Hon'ble Mr.Justice : D.B. Bhosale

1. Whether Reporters of Local papers may be allowed to see the judgement ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Office?